No. 12,781

IN THE

United States Court of Appeals

For the Ninth Circuit

THOMAS HENRY BURGTORF,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

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JURISDICTION.

The trial Court had jurisdiction under an indictment charging violation of the following section:

Section 12, Selective Service Act of 1948, Title 28 United States Code, Section 1291 and Rule 37(a) Federal Rules of Criminal Procedure.

This Court has jurisdiction under Section 128(a) of the Judicial Code as amended by Act of February 15, 1925. (28 U.S.C.A. 225.)

STATEMENT OF THE CASE.

Thomas Henry Burgtorf, the appellant, was indicted by the Grand Jury for the Northern District

of California, Southern Division. The indictment charged appellant with a violation of the "Selective Service Act of 1948", in that he failed to submit to induction into the Land or Naval Forces of the United States. (R. 159.)

To the indictment in question the appealing defendant entered a plea of not guilty. (R. 166.)

The appellant was found guilty of the charge contained in the indictment and was sentenced by the trial Court to imprisonment in the U. S. Penitentiary for a period of five years (R. 169), being the longest sentence ever imposed in the District upon a religious objector.

At the conclusion of the government's case in chief, appellant moved the Court for a dismissal of the indictment on the ground that the evidence was insufficient as a matter of law to sustain a conviction, which motion was denied. (R. 83.) At the conclusion of defendant's case and all of the testimony, appellant renewed his motion to dismiss on the same ground, which motion was denied. (R. 134.)

After the decision and sentence as herein stated, the appellant duly filed a notice of appeal (R. 170) and thereafter duly filed his designation of the record to be used on appeal.

SUMMARY OF THE EVIDENCE.

Appellant is a religious objector to war and participation in war in any form. (R. 20 and 57 and 91

to 95.) He is a minister of the society of Jehovah's Witnesses and considers that to voluntarily enter the armed forces would make him a traitor to God. (R. 79.)

When he filed his questionnaire with the Draft Board he indicated in his answers that he was a minister and claimed exemption as such. (R. 57.) He neglected or overlooked the fact that he should have filed supporting evidence of his claim. (R. 57.)

On October 1, 1948, the Draft Board classified him as 1-A. (R. 11.) An entry was then made in the record of the Draft Board indicating that a notice of the classification was mailed to appellant. (R. 11.) The clerk had no independent recollection of having actually mailed the notice. (R. 39 and 41.) Appellant consistently denied that he ever received the notice. When he got the notice to report for a physical examination (which would be the first word from the Board after classification), he complained that he had not received any classification notice. (R. 41.) He appeared before the Board and made the same complaint. (R. 58.) And again to the F.B.I. agent. (R. 55.) He testified unequivocally that he did not receive such notice. (R. 84 and 85.)

A registrant has but 10 days to appeal from his classification, after notice. (R. 12.) When he got the notice to take a physical examination he went to the Draft Board and claimed he had not received any notice and sought to appeal. (R. 12.) The Board granted appellant an appearance before it "with the understanding that it would not necessarily reopen

his case". (R. 14.) The minutes of that meeting shows: "Mr. Burgtorf appeared before the Board and was advised by the Board that since he had not appealed within his appeal period *they were not re-opening* his case but would let him present any information he wanted." (R. 15.) He gave certain oral testimony (R. 15) and presented certain documents. (R. 43.) After the hearing the Board advised appellant that "his case had not been reopened; therefore he wasn't entitled to an appeal". (R. 16 and 17.) No new notice of classification after hearing was mailed. (R. 88.)

Thereafter the State office of Selective Service wrote the Local Board a letter advising the Board to permit an appeal and to advise appellant that he could attach additional matter to the file to be sent to the Appeal Board. (R. 22 to 24.) Appellant did submit additional documents. (R. 24.)

The file was then sent to the Appeal Board. (R. 25 and 27.) This Appeal Board affirmed the 1-A classification. (R. 30.) Appellant was sent an order to report for induction. (R. 35.) He so reported (R. 36) but refused to be inducted. (R. 53.) He was subsequently indicted for such refusal and in a trial before the Court, without a jury, he was convicted and sentenced to five years in prison.

SPECIFICATION OF ERRORS RELIED UPON.

The Court erred in denying the motion of defendant for a dismissal of the indictment on the ground that the evidence was insufficient as a matter of law to sustain the conviction, made at the conclusion of the testimony on behalf of the United States and renewed at the conclusion of all the evidence (R. 83 and 134) for the following reasons:

1. There was a failure of due process before the Draft Board;

2. There was no evidence to support the classification by the Draft Board and none to support the conviction.

ARGUMENT.

There was a clear failure of due process within the administrative agency, namely, the Draft Board and the Appeal Board. Due process within such an agency requires that those administering it follow strictly the regulations and that the registrant be accorded all the rights provided for by those regulations—otherwise there is no due process.

St. Joseph Stockyards Co. v. U. S., 298 U.S. 38, 56 S. Ct. 720, 80 L. Ed. 1033;

Yamataga v. Fisher, 189 U.S. 86, 23 S. Ct. 611, 47 L. Ed. 721;

U. S. v. Laier, 52 F. Supp. 392;

U. S. v. Peterson, 53 F. Supp. 760.

Through no fault of his own the appellant lost all the substantial rights to which he was entitled under

the Selective Service Act and Regulations. These require: (1) Classification by the Board (Regulation 1623.1); (2) mailing of a notice of such classification to registrant (Regulation 1623.4(b)); right to receive an open hearing before the Board and to be again classified after such hearing (Regulation 1625.2); right to appeal such final classification (Regulation 1626.2).

Registrant lost all these substantial rights through failure to receive his notice of classification. That he did not receive this classification must stand as proved. His testimony was, categorically, that he did not get the notice. (R. 84.) The only testimony in opposition was that of the clerk of the Board, who had no independent recollection of mailing it, but who thought she must have because there was an entry in the record that it was mailed. (R. 39 and 41.)

Mere "negative" testimony will not overcome positive, affirmative evidence.

Canion v. S. P. Co., 80 Pac. (2d) 397 (Ariz.).

The pretended hearing by the Board in which it indicated at the very beginning that it was not "reopening" his case, did not in the slightest rectify that situation. (R. 15.) At this so-called "hearing" he was permitted to come and bring his evidence and submit it but with the understanding that the Board would not do anything about it. Obviously, this is not a "hearing" in any legal sense. The result was that at no time did the local Board (the fact-finding body) ever pass on his evidence.

The sham was further pursued by the procedure after the hearing when appellant was advised to attach whatever evidence he wished to the file and it would be sent to the Appeal Board. (R. 22-24.) Here we have a situation where a case comes before the Appeal Board pre-judged by the fact-finding body without that body ever passing on the evidence. The California District Court of Appeal (2nd Dist.) once said that a judge not only ought to be fair, but he ought to *appear* to be fair. *Rosenfield v. Vasper,* 45 C.A. (2d) 365. Certainly nothing *appears* more unfair than the procedure followed here. It was a sham and a mockery and a blatant denial of due process under the authorities cited. Such being the case, there is nothing to support the judgment of conviction.

The judgment must fall for another reason. There is no evidence to support the Draft Board's action in classifying defendant as 1-A.

He claimed as a minister in his questionnaire. (R. 8-9.) Declared that he had been formally ordained as a minister on June 10, 1942 by an ecclesiastical official authorized to perform ordination for the religious society of which he was a member (R. 9.) and that he regularly served as a minister. There was no other evidence before the Board except some evidence as to his secular employment. On this record the Board denied his claim as a minister and classified him 1-A. (R. 11.)

Defendant then presented further evidence in form of affidavits which further confirmed his ministry

(R. 89-95) and set forth, rather fully, his beliefs and activities as a minister, as well as indicating his ordination as a minister.

None of this evidence was contradicted. There was therefore no evidence before the Board which justified its denying his claim as a minister.

Where there is no evidence to support the classification given by the Board, its action must be considered arbitrary and ineffective and its decision will be set aside by the Court.

Cox v. United States, 332 U.S. 442, 68 S. Ct. 115;

Niznik v. United States, 173 F. (2d) 328;

Niznik v. United States, 184 F. (2d) 972.

The decision of the Draft Board appears to rest more upon prejudice than upon evidentiary facts. Nor is this element entirely lacking in the decision of the Court, as witness the almost reckless finding "that the matter of the defendant's testimony that he did not receive any notice is a pure afterthought"—with no evidence whatever to support it.

There has been a general failure of due process throughout the whole proceedings.

Estep v. United States, 327 U.S. 114, 66 S. Ct. 423;

Smith v. United States, 157 Fed. (2d) 176 (4th Cir.);

United States v. Zieber, 161 Fed. (2d) 90 (3rd Cir.).

It is respectfully submitted that the motion to dismiss should have been granted and that the conviction should be reversed.

Dated, Oakland, California,
March 26, 1951.

CLARENCE E. RUST,
Attorney for Appellant.